The character of property acquired by either spouse by adverse possession with reference to the distinction between separate and community property gives rise to some interesting questions. Where a married woman living separate from her husband acquired such title, it was held to be her separate property, as "accumulations" made while living separate and apart from her husband.[6] But her "accumulations," while not separated from her husband, are not declared to be her separate property by statute, and the husband's "accumulations" are always community property. Suppose, therefore, that an unmarried woman or an unmarried man buys property, the title of which is defective, and after marriage he or she perfects the title by adverse possession, will the proper limits of statutory interpretation permit it to be said that the property is the separate property of such spouse? The suggestion made in the case of Union Oil Company v. Stewart that the property might possibly be regarded as conveyed during coverture rests on an absolutely erroneous notion of the nature of title by adverse possession, and, while, if followed, it might serve very well to accomplish a desirable result with reference to the wife's property, would leave the situation with regard to the husband's property in just as bad a condition as if the suggestion had not been followed.

O. K. M.

Assignment of Choses In Action: Priority of Party Who First Gives Notice.—The case of Wideman v. Weininger [1] involves the rights of successive assignees of a chose in action. The court affirms the rule adopted in Graham Paper Company v. Pembroke,[2] as follows: "As between successive assignees of a chose in action, he will have the preference who first gives notice to the debtor, even if he be a subsequent assignee, provided at the time of taking it he had no notice of the prior assignment." If the assignee omits to give notice to the debtor of the assignment, he is "guilty of the same degree and species of neglect as he who leaves a personal chattel, to which he has acquired title, in the actual possession and under the control of another person." Before the Pembroke case, (which does not notice the previous line of authorities) [3] the rule in California had been firmly established, that the assignee of a chose in action obtained a per-

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[6] Union Oil Company v. Stewart, 158 Cal. 149; 110 Pac. 313; Ann. Cas. 1912A, 567. Civil Code, Cal. sec. 169.

[1] Wideman v. Weininger (1913), 45 Cal. Dec. 185, 130 Pac. 421.

[2] Graham Paper Company v. Pembroke (1899), 124 Cal. 117, 56 Pac. 627.

[3] Fore v. Manlove (1861), 18 Cal. 437; Walling v. Miller & Co. (1860) 15 Cal. 38; Mitchell v. Hockett et al. (1864), 25 Cal. 539; Southard v. McBrown (1883), 63 Cal. 545; After Pembroke case; Curtin v. Kowalsky (1904), 145 Cal. 431, 78 Pac. 962; Title Insurance Co. v. Williamson (1912), 18 Cal. App. 324, 123 Pac. 245. But see Title Ins. & Trust Co. v. Carpenter & Beles Mills & Lumber Co. (1912), 123 Pac. 247; (not officially reported) Cal.

fect title both as against subsequent assignees and creditors of the assignor, although the debtor was not notified of such assignment. This latter doctrine has been adopted by the majority of the American courts [4] and seems to be correct in principle. The transfer being completed between the parties, the vendor is divested of all interest in the property, both legal and equitable. An assignment of his interest would, therefore, pass nothing.

The court apparently bases its decision on an analogy between the sale of personal chattels in the possession of the vendor, without a transfer of possession to the vendee and the assignment of a chose in action without notice to the debtor of such assignment. In that both are valid unless made to defraud creditors or subsequent purchasers, the analogy seems to be sound; but in the proof of this fraud the code has made an important distinction between the two. Section 3440 of the Civil Code provides that every transfer of personal property in the possession of the vendor other than a chose in action, [5] is conclusively presumed to be fraudulent as against creditors and subsequent purchasers, unless it be accompanied by a change of possession. The express exemption of choses in action from the operation of this section would seem to indicate that their assignment can not be conclusively presumed to be fraudulent from the mere failure to reduce them to possession, but that the fraud must be proved by other evidence. The failure to notify the debtor of the assignment might be some evidence of fraud, but not conclusive evidence.

This reasoning is in accord with the decision in the late California case of Curtin v. Kowalsky, [6] which the court attempts to distinguish from the principal case by the remark that the rights of the second assignee were not involved in the former case. This case was a suit by the first assignee to collect the judgment assigned to him. The defendant offered to prove that there was a subsequent assignment of the judgment prior to this action and that the second assignee gave him the first notice of its transfer. The court held that "the other claimant, (the second assignee), although a bona fide purchaser for value, did not acquire a title superior to that of the plaintiff. . . . If the assignor has no title, they will take none, whether they have notice or not."

It is true that a determination of the rights of the second assignee was not involved in this suit. But the question as to whether a subse-

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[4] Muir v. Schneck and Robinson (1842), 3 Hill 228, 38 Am. Dec. 633; Greentree v. Rosenstock (1875), 61 N. Y. 583; White v. Wiley (1860), 14 Ind. 496; Kennedy v. Parke (1864), 17 N. J. Eq. 415; Thayer v. Daniels (1873), 113 Mass. 129;Tingle v. Fisher (1882) 20 W. Va. 497; Lewis v. Lawrence (1883), 30 Minn. 244, 15 N. W. 113; Meier v. Hess et al. (1893), 23 Ore. 599, 32 Pac. 755; Bellingham Bay Boom Co. v. Brisbois et al. (1896), 14 Wash. 173, 44 Pac. 153. For rule in Germany, France and England see 4 Harvard Law Rev. 309, n 2.

[5] Also " a ship or cargo at sea or in a foreign port."

[6] Curtin v. Kowalsky, supra.

quent assignee of a chose in action can defeat a prior assignment was directly involved and its adjudication was essential to the decision of the case. This is evident from the fact that the defendant has a right to have the action prosecuted by one who can give a valid release of the obligation.[7] If the right to collect the judgment in this case was in the second assignee, the debtor, with notice of such right, would not be released from his obligation by payment to the first assignee. Therefore the court by holding that the first assignee could maintain an action to collect the judgment, and that the defendant could not introduce in evidence a subsequent assignment of which he received notice prior to notice of the first assignment, necessarily held that the right to collect the judgment was still in the first assignee.

M. B. K.

Bills and Notes: Negotiability of Note Secured by Mortgage.—A promissory note states on its face that it is secured by a mortgage. Is it a negotiable instrument, free of all equities in the hands of a bona fide holder, or may the maker set up against the holder failure of consideration or any other defences which he might have had against the payee? Since the case of Meyer v. Weber[1] it has been the recognized law in California that a note thus secured is non-negotiable and that both the note and the mortgage are taken by the bona fide holder subject to the equities in favor of the maker. In a recent case[2] this rule has been reasserted, but the bona fide holder was accorded the same relief on the ground of estoppel by deed, to which she would have been entitled had the instrument been considered negotiable.

Though the law as to the non-negotiability of the note in question is well settled in this state,[3] a different result has been reached in the majority of jurisdictions.[4] The reasoning of the cases would seem to dispose successfully of all of the grounds upon which the California court rested its decision in Meyer v. Weber, save one. The view expressed in the leading California case that the note and mortgage are to be considered as merged together into one instrument, under the code provision[5] that contemporaneous instruments relating to the same subject matter are to be "taken together" is well answered by the proposition that the instruments are to be taken together solely for

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[7] Woodseim v. Cole (1886), 69 Cal. 142, 10 Pac. 331; Myers v. South Feather Water Co. (1858), 10 Cal. 579; Giselman v. Starr (1895), 106 Cal. 651, 40 Pac. 8; Simpson v. Miller (1907), 7 Cal. App. 248, 94 Pac. 252; Kettner v. Shippey (1908), 8 Cal. App. 342, 96 Pac. 912; California Code Civ. Proc. Sec. 367.

[1] (1901) 133 Cal. 681, 65 Pac. 1110.

[2] National Hardwood Co. v. Sherwood, (Supreme Court, Feb. 25, 1913) Cal. Dec. 279, 130 Pac. 881.

[3] See also Briggs v. Crawford, (1912) 162 Cal. 124, 121 Pac. 381; Helmer v. Parsons, (1912) 18 Cal. App. 450, 123 Pac. 456.

[4] Carpenter v. Longan, (1872) 16 Wall. 271; Zollman v. Jackson Bank, (1909) 238 Ill. 290, 87 N. E. 297. Note in 32 L. R. A. (N. S.) 858; 27 Cyc. 1324; 20 A. & E. Enc. 1043.

[5] California Civil Code, §1642.